Supreme Court, U.S.
SEP 23 1994

No. 94-351

IN THE
SUPREME COURT OF THE UNITED STATES

RODNEY TODD, as Special Administrator of the Estate of TIFFANY TODD, a deceased minor,

Petitioner,

v.

SOCIETE BIC, S.A. and BIC CORPORATION,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF OF RESPONDENTS SOCIETE BIC, S.A. AND BIC CORPORATION IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether Petitioner has identified special and important reasons, as required by Rule 10.1 of the Rules of the Supreme Court of the United States, for the review of the decision of the United States Court of Appeals for the Seventh Circuit in a case involving state law claims exclusively, when no constitutional or federal question has been raised and in the absence of a conflict between the Court of Appeals' decision and the decisions of other United States Courts of Appeals or the Supreme Court?

2. Whether the United States Court of Appeals for the Seventh Circuit was within its grant of power to decide a question of state law which the Illinois Supreme Court specifically declined to address?

3. Whether the United States Court of Appeals for the Seventh Circuit properly invoked its power in granting rehearing *en banc*?

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JURISDICTIONAL STATEMENT

Respondents received the Petition for a Writ of Certiorari on August 25, 1994. This brief is filed on behalf of both Respondents, Societe BIC, S.A. and BIC Corporation.[1]

STATEMENT OF THE CASE

I. FACTUAL RECITATION

On March 27, 1988 at the home of the Smith and Todd families in Earleville, Illinois, a fire started by Cori Smith caused the death of Tiffany Todd. During the relevant time period, Herbert and Kathy Smith and their family, and Darlene and Rodney Todd, Sr. and their family all lived in the same house on Rural Route #3 in Earleville, Illinois. All the adults in the household smoked cigarettes at or around the time of this incident. Herbert Smith used a Zippo lighter to light his cigarettes; Kathy Smith used a BIC lighter to light her cigarettes; Darlene Todd used a BIC lighter or matches to light her cigarettes; and Rodney Todd, Sr. did not recall what he used to light his cigarettes at that time. Kathy Smith and Darlene Todd have both used BIC lighters since this accident.

Sometime before 8:00 a.m. on March 27, 1988, 4-year-old Cori Smith, who had been sleeping with her parents in their downstairs bedroom, awoke and walked into the living room of the home. Cori found a green lighter on the end table in the living room, proceeded upstairs to the bedroom in which 22-month-old Tiffany Todd was sleeping and ignited some papers. After igniting and leaving the burning paper on the floor of the upstairs bedroom, Cori walked back downstairs and replaced the lighter on the end

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[1] Pursuant to Supreme Court Rule 29, lists of Respondents' subsidiaries which are not wholly-owned are found at pages 18 and 19 of this Brief.

table from which she had obtained it initially. Cori then obtained a glass of water and attempted to walk back upstairs in order to extinguish the fire. After a brief conversation with her brother, Nathan Smith, Cori apparently ascended the stairs and came running back down. Rodney Todd, Jr., who had been in another upstairs bedroom, followed Cori downstairs yelling that there was a fire in the upstairs bedroom where Tiffany was sleeping. The shouts from the children in the living room brought the adults, who were still in bed, rushing to the living room. Certain unsuccessful attempts were made to rescue Tiffany from the burning upstairs bedroom. The fire and the smoke in the home became so intense that the occupants exited when the fire department arrived.

Approximately one hour after the fire was extinguished, Commander James Hollenbeck, of the Office of the Illinois State Fire Marshall, Division of Arson Investigation, was contacted in connection with the fire. After arriving at the scene, Commander Hollenbeck conducted an investigation which included interviewing Herbert Smith regarding his knowledge as to the cause of the fire. Mr. Smith told Commander Hollenbeck that approximately one week prior to the accident, Cori had obtained a cigarette lighter and started a small fire in her parents' bedroom. Commander Hollenbeck also interviewed Cori who said that she had started the fire which was under investigation. Commander Hollenbeck testified that based upon his investigation of the fire, there was no evidence or information that the lighter which Cori allegedly used malfunctioned in any way.

In connection with the use of lighters, both Herbert Smith and Kathy Smith testified that they were aware of the potential danger of children playing with fire and specifically warned their children, including Cori, not to play with lighters or matches. Similarly, Rodney Todd, Sr. had advised his children not to play with

matches or lighters because of the potential for injury posed by playing with fire. In fact, approximately one week prior to the fire which caused Tiffany's death, Darlene Todd had warned Cori not to play with fire, matches or lighters. Indeed, Cori also testified that prior to this accident, she was aware that she should not play with lighters or matches because she knew that being near fire was not safe. Warnings and instructions to "KEEP OUT OF REACH OF CHILDREN" or "KEEP AWAY FROM CHILDREN" have always accompanied BIC lighters.

In addition to the facts set forth above, Respondents admitted for the purpose of the summary judgment motion only, that it was feasible to design a lighter with enhanced child-resistant features and that it was foreseeable that a child of the approximate age of Cori could obtain and operate a BIC lighter.[2]

II. PROCEDURAL POSTURE

On March 26, 1990, Petitioner filed a complaint at law in the circuit court of Cook County, City of Chicago, State of Illinois. Respondents timely removed this case to the United States District Court, Northern District of Illinois, Eastern Division. Petitioner's Complaint at law sought to recover on a wrongful death claim against BIC Corporation under the theories of strict liability and negligence alleging a design defect in the BIC lighter, strict liability and negligence alleging inadequate warnings provided with the BIC lighter, and abnormally dangerous activity. This last theory of recovery was not pursued by Petitioner at the trial court level.

Respondents moved for summary judgment on all claims. By

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[2] Contrary to Petitioner's assertions, Respondents did not concede that, at the time of this accident, it had developed a marketable lighter with enhanced child-resistant features.

Order dated January 7, 1992, the Honorable Ann Claire Williams, United States District Court Judge, granted Respondents' motion for summary judgment in all respects. (App. F1-F14)[3]. Petitioner appealed the trial court's order to the Court of Appeals for the Seventh Circuit which, by opinion filed April 27, 1993, reversed the trial court's judgment. (App. D1-D17). By Order dated July 2, 1993, the United States Court of Appeals for the Seventh Circuit voted, by a 9 to 2 margin, to vacate the April 27, 1993 opinion and to rehear this matter *en banc*. (App. C1, A2 n.1). On November 11, 1993, the United State Court of Appeals for the Seventh Circuit, in a 6 to 5 *en banc* opinion, certified two questions to the Illinois Supreme Court; however, Judge Easterbrook, writing for the majority, specifically invited the Illinois Supreme Court to review any aspect the case and reformulate the certified questions as necessary. (App. B1-B25, B11). On November 22, 1993, the Illinois Supreme Court declined to answer the certified questions. (App. E1).

On April 12, 1994, the United States Court of Appeals for the Seventh Circuit issued a second 6 to 5 *en banc* decision affirming the trial court's grant of summary judgment on behalf of Respondents in all respects. (App. A1-A31). By Order dated May 26, 1994, the United States Court of Appeals for the Seventh Circuit denied Petitioner's Petition for Rehearing and Suggestions for Rehearing *En Banc*. (App. A32-A33).

On August 25, 1994, counsel for Respondents received the Petition for a Writ of Certiorari. It is in opposition to this petition that Respondents submit this brief.

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[3] The abbreviation "App." refers to the Appendices attached to Petition for a Writ of Certiorari.

SUMMARY OF ARGUMENTS

The petition fails to present questions warranting this Court's attention. This action concerns construction of state law exclusively. No federal or constitutional questions are presented. Further, no direct conflict exists between the Court of Appeals' decision and the decisions of any other Court of Appeals or of this Court.

The Court of Appeals properly applied Illinois law in affirming the trial court's grant of summary judgment on all claims. The Court of Appeals reviewed the historical development of Illinois product liability law and concluded that the precise issue presented on appeal had not been squarely addressed by the Illinois Supreme Court. For this reason, the Court of Appeals certified certain questions to the Illinois Supreme Court which declined to address the questions. As a result, it was incumbent upon the Court of Appeals to interpret Illinois law by reference to intermediate appellate court decisions. Accordingly, the Court of Appeals determined that the Illinois Supreme Court would not conclude that an ordinary disposable lighter is unreasonably dangerous.

The Court of Appeals has the congressional grant of power to order rehearing of any matter *en banc*. Under the circumstances of this case, a sufficiently important question was raised so as to require the rehearing *en banc*.

REASONS FOR DENYING THE WRIT

I. PETITIONER HAS FAILED TO DEMONSTRATE SPECIFIC AND IMPORTANT REASONS FOR THIS COURT'S DISCRETIONARY REVIEW OF THE COURT OF APPEALS' DECISION

This Court ordinarily employs its certiorari jurisdiction only under extraordinary circumstances in order to resolve conflicts

among the federal circuit Courts of Appeals and the state courts concerning the meaning of federal law. See Braxton v. United States, 500 U.S. 344, 347 (1991). The petition in this case focuses exclusively on the United States Court of Appeals for the Seventh Circuit's interpretation of Illinois substantive law. Certiorari is not ordinarily granted to review federal court decisions construing state laws. Commissioner v. Estate of Bosch, 387 U.S. 456, 462 (1967) ("The issue presents solely a question of state law and '(w)e ordinarily accept the determination of local law by the Court of Appeals...and we will not disturb it here.'" (citations omitted)). This Court rarely overturns the determinations of state substantive law when made by the Courts of Appeals particularly when the same conclusions are drawn by a federal district court. *See* Butner v. U.S., 440 U.S. 48, 58 (1979)("The federal judges who deal regularly with questions of state law in their respective districts and circuits are in a better position than we to determine how local courts would dispose of comparable issues."); *see also* Appalachian Power Co. v. Amer. Institute of Certified Public Accountants, 80 S.Ct. 16 (1959)(denying application for order staying mandate when none of the questions proposed to be presented by petitioners in petition for certiorari had prospect of commanding four votes for review). Indeed, this Court has recognized the value of the district courts' and Courts of Appeals' decisions and has gone so far as to foreclose review of decisions on state law even though a different conclusion may be justified. See Bishop v. Wood, 426 U.S. 341, 346 (1976)("[t]his Court has accepted the interpretations of state law in which the district court and the Court of Appeals have concurred even if an examination of the state-law issue without such guidance might have justified a different conclusion.").

Petitioner raises no federal or constitutional questions. There are no issues that establish a conflict among the Courts of Appeals

regarding the application of any federal law or that establish a direct conflict between the Court of Appeals' decision in this case and other decisions of this Court. Simply put, Petitioner is seeking review from this court of a state law issue which has been the subject of one district court opinion and three Court of Appeals' opinions. The petition in this case does not serve to further substantial justice or judicial economy but merely prolongs a juridical odyssey which began nearly three years ago with the district court's memorandum and order. The petition in this case is nothing more than an invitation to this Court to cast aside its long held practices of accepting the Court of Appeals determination of local law, and to engage in a *de novo* review of Illinois substantive law when the Illinois Supreme Court itself has refused to do so. Accordingly, in the absence of any prior Supreme Court decisions that are at odds with the Court of Appeals' ruling in this case, Petitioner has wholly failed to demonstrate specific and important reasons to justify this court's acceptance for certiorari.

II. THE COURT OF APPEALS PROPERLY EXERCISED ITS POWER IN DECIDING THE CORRECT APPLICATION OF ILLINOIS SUBSTANTIVE LAW

Petitioner argues that the Court of Appeals erroneously interpreted Illinois law in arriving at its conclusions. Petitioner further argues that the Court of Appeals improperly relied on intermediate appellate decisions while ignoring Illinois Supreme Court decisions. Petitioner's arguments are untenable given the procedural posture and legal reality of this case.

At the trial court level, Petitioner had two principal theories: (1) Respondents provided an inadequate warning with its lighters; and (2) Respondents had a duty to incorporate enhanced child-resistant features in an ordinary disposable lighter, and the failure to do so gave rise to claims of strict liability and negligence.

The trial court granted summary judgment on all claims against Respondents holding, among other things, that Respondents' warnings were adequate as a matter of law and that BIC was not strictly liable or negligent for failure to include enhanced child-resistant features in the BIC lighter used by Cori Smith. In arriving at the second conclusion, the court determined that, under Illinois law, the appropriate test for determining whether a product is unreasonably dangerous is set out in Restatement (Second) of Torts, § 402A, Comment i (1965). This test is referred to as the "consumer-contemplation test" and states that a product is unreasonably dangerous "when it is 'dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to its characteristics.'" Palmer v. Avco Distribution Corp., 82 Ill. 2d 211, 216, 45 Ill. Dec. 377, 412 N.E.2d 959 (1980), quoting Restatement (Second) of Torts, § 402A, Comment i (1965). (App. F7-F18).

Petitioner appealed the trial court's determination to the United States Court of Appeals for the Seventh Circuit which, in a 2 to 1 decision, reversed the trial court's rulings, holding that genuine issues of fact existed regarding the adequacy of Respondents' warnings, that the consumer-contemplation test was misapplied by the trial court and that the trial court failed to apply the "risk-benefit" or "risk-utility" analysis discussed in the Illinois Supreme Court case of Lamkin v. Towner, 138 Ill. 2d 510, 563 N.E.2d 449 (Ill. 1990). (App. D5-D8).

Expressing great concern about the implications of the three judge panel's reasoning, the full Court of Appeals for the Seventh Circuit vacated the panel's decision and set the case for rehearing *en banc* (App. C2, B2). The Court unanimously affirmed the trial court's summary disposition of Petitioner's failure to warn claim

and in a 6 to 5 decision, determined that certification to the Illinois Supreme Court was appropriate given the lack of clarity of Illinois law on the design defect issues raised in this case. Contrary to Petitioner's assertions in the petition for certiorari, the Illinois Supreme Court was not limited to the questions certified but, as Judge Easterbrook stated:

> It may be that when revisiting the state's law of products liability the Justices of the Supreme Court of Illinois will conclude that these are not the right questions. In that event, the Justices should feel free to reformulate the questions, just as they would when dealing with the issues posed in a petition for leave to appeal. It is not our purpose to constrain the state court.

(App. B11).

Five Court of Appeals judges dissented from the vote for certification. The dissenting judges concluded that although the majority correctly affirmed the trial court's summary judgment order on the warning claim, it inappropriately certified the case to the Supreme Court of Illinois when reference to the appropriate Illinois case law led one to the inevitable conclusion that a BIC lighter without enhanced child-resistant features was not an unreasonably dangerous product. Indeed, certification of these questions to the Illinois Supreme Court delayed the inevitable. As Judge Posner stated:

> I voted to rehear the case *en banc*; I think we should bite the bullet and decide it now. By certifying these questions to the Supreme Court of Illinois, we merely delay the resolution of the case, impair the proper operation of the common law process, and burden another court.

(App. B21).

The Illinois Supreme Court declined to accept certification. (App. E1).

As a result of the Illinois Supreme Court's refusal to consider the issues in this case, it was incumbent upon the Seventh Circuit Court of Appeals to interpret Illinois law and make a determination of the remaining issues. The five dissenting judges from the first *en banc* opinion were joined by Judge Easterbrook to form the majority in the second *en banc* decision, affirming the trial court's summary judgment on Petitioner's design defect claim. Writing for the majority, Judge Manion properly acknowledged the Court of Appeals' role in determining cases of state substantive law:

> We will resolve the issues of state law which this case presents in accordance with the decisions of the Illinois Supreme Court. See Charles A. Wright, Arthur R. Miller and Edward H. Cooper, Federal Practice and Procedure § 4507 at 89 (1982)("Federal court must determine issues of state laws as it believes the highest court of the state would determine them"). Where areas of state law are not developed, we will resort to other persuasive authority in an attempt to determine what the Illinois Supreme Court would decide. See Heller Intern. Corp. v. Sharp, 974 F.2d 850, 858 (7th Cir. 1992).

(App. A5).

In applying Illinois law, the majority determined that the Illinois Supreme Court would not apply the risk-utility test in analyzing whether a BIC disposable lighter was defective in design for failure to incorporate enhanced child-resistant features and that

the case of Lamkin v. Towner, *supra*,[4] did not mandate the application of a risk-utility test to simple but obviously dangerous products. (App. A19).

In fact, the Illinois intermediate court decision of Scoby v. Vulcan-Hart Corp., 211 Ill. App. 3rd 106, 569 N.E.2d 1147 (4th Dis. 1991), appeal denied, 141 Ill. 2d 560, 580 N.E.2d 135 (1991) provided the most insightful analysis of Illinois law and the greatest assistance to the Court of Appeals in predicting how the Illinois Supreme Court would decide the issues presented in this case. In concluding that the Illinois Supreme Court would not apply the risk-utility test under the circumstances of this case, the majority observed:

> No Illinois court has applied the risk-utility test to a simple but obviously dangerous product. We need not expand upon the Illinois Supreme Court's already broad statement of Lamkin, and apply the test to such a product. If the question before us was, simply, "Does Illinois authorize the risk-utility test to determine whether a product is unreasonably dangerous?" the answer would be clear. Certainly, the Illinois Supreme Court has authorized use of the test in some cases. But the question before us is slightly different: "Does Illinois authorize use of the risk-utility test for a simple product which poses an obvious danger?" The answer to this question in not so clear. The Illinois Supreme Court has

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[4] Petitioner also argues that the holding in the Illinois Supreme Court case of Doser v. Savage Mfg. & Sales Inc., 142 Ill. 2d 176, 568 N.E.2d 814 (1990) requires reversal of the second *en banc* decision. However, the majority correctly observed that Doser is inapplicable to this case because Doser "never even *mentions* the consumer contemplation test." (App. 11 n.4).

> never applied the test to such a product. An intermediate appellate court has determined that it never will. Scoby, 569 N.E.2d at 1151. Our task in a diversity case is to predict what the state's highest court would do if presented with the same issue. See Heller, 974 F.2d at 858; see also Wright, Miller and Cooper, § 4507 at 94 ("If the state's highest court has not ruled on an issue, intermediate appellate court decisions constitute the next best indicia of what state law is."). Based on our examination of past and current Illinois case law, we agree with the appellate court which decided Scoby, that the Illinois Supreme Court would not apply the risk-utility test to simple and obviously dangerous products. *Accord* Mason v. Ashland Exploration Inc., 965 F.2d 1421, 1428 (7th Cir. 1992)(treating Scoby as authoritative reading of Lamkin).

(App. A18-A19).

The majority's interpretation of Illinois law is clearly within its constitutional grant of power and in accord with this Court's holding in Erie v. Tompkins, 304 U.S. 64 (1938). In an attempt to ascertain the correct interpretation of Illinois law, the Court of Appeals certified this case to the Illinois Supreme Court. Unable to obtain an answer from the Illinois Supreme Court, the Court of Appeals embarked upon a thorough and searching analysis of Illinois law, using all available data in order to predict how the Illinois Supreme Court would decide this matter. As this Court has held:

> [a]n intermediate appellate state court rests its considered judgment upon the rule of law which it announces, that is a datum for ascertaining state law which is not to be disregarded by a federal court unless it is convinced by

other persuasive data that the highest court of the state would decide otherwise.

West v. AT&T, 311 U.S. 223, 237 (1940)(citations omitted).

Contrary to Petitioner's assertion, the Court of Appeals did not usurp the power of the Illinois Supreme Court in deciding this case. The Court of Appeals discharged its duty by deciding this case. Petitioner requests that this Court invoke its discretionary jurisdiction in order to supplant not only the Court of Appeals' judgment but to somehow step into the shoes of the Illinois Supreme Court and decide issues which the Illinois Supreme Court has refused to address. Such a process not only undermines the authority of the Court of Appeals but that of Illinois' highest tribunal. The Court of Appeals is in the best possible position to decide this case given its current procedural posture. This Court succinctly characterized the value of the Court of Appeals' decision-making process when it observed:

> Courts of appeals, on the other hand, are structurally suited to the collaborative juridical process that promotes decisional accuracy. With the record having been constructed below and settled for purposes of the appeal, appellate judges are able to devote their primary attention to legal issues. As questions of law become the focus of appellate review, it can be expected the parties' briefs will be refined to bring to bear on the legal issues more information and more comprehensive analysis than was provided for the district judge. Perhaps most important, courts of appeals employ multi-judge panels, See 28 U.S.C. §§ 46(b) and (c), that permit reflective dialogue and collective judgment.

Salve Regina College v. Russell, 499 U.S. 225, 232 (1991).

The Court of Appeals in this case focused on Scoby, an

intermediate appellate court decision, and used this decision as a barometer for predicting how the Illinois Supreme Court would determine the questions of law presented in this case.[5] The Illinois Supreme Court has remained silent on these issues. The United States Court of Appeals for the Seventh Circuit has not. The Court of Appeals has expended a great number of judge-hours and has generated in excess of 70 pages of judicial opinion in arriving at its final decision. Respondents respectfully submit that this Court should not now substitute its judgment for that of the Court of Appeals when such an intrusion is unwarranted and unjust.

III. THE COURT OF APPEALS PROPERLY INVOKED ITS POWER IN GRANTING REHEARING *EN BANC*

Finally, Petitioner challenges as improper the exercise of the Court of Appeals' authority to rehear this matter *en banc*.[6] Interestingly, Petitioner fails to note that 9 of the 11 judges in active service on the Court of Appeals voted to vacate the original three judge panel's decision and to rehear this matter *en banc*. (App. A2 n.1.). Moreover, it has long been held that the power to order a rehearing *en banc* is squarely invested with the Courts of Appeals. As this Court observed:

[I]n our view, [28 U.S.C.] § 46(c) is not addressed to

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[5] This Court has repeatedly underscored the value of intermediate appellate state court decisions when a state's highest court refuses to review those decisions. *See* King v. Order of United Commercial Travelers of America, 333 U.S. 153, 158 n.13 (1948).

[6] Petitioner seems to overlook that he petitioned for rehearing with a suggestion for rehearing *en banc* after the second *en banc* decision was unfavorable to him. The petition and suggestion were subsequently denied. (App. A33).

> litigants. It is addressed to the Court of Appeals. It is a grant of power. It vests in the court the power to order hearings *en banc*. It goes no further. It neither forbids nor requires each active member of a Court of Appeals to entertain each petition for a hearing or rehearing *en banc*. The court is left free to devise its own administrative machinery to provide the means whereby a majority may order such a hearing.

Western Pac R. Corp. v. Western Pac R. Co., 345 U.S. 247, 250 (1953).

The procedure of granting an *en banc* hearing is normally used to address issues of exceptional importance and/or to secure or maintain the uniformity of decisions within the circuit. Moody v. Albemarle Paper Co., 417 U.S. 622, 626 (1974). As this Court has stated:

> [I]n the wise use of this exceptional power to 'determine the major doctrinal trends of the future' for a particular circuit, American-Foreign, 363 U.S., at 690, 80 S.Ct., at 1339, Congress appears to have contemplated the need for an intimate and current working knowledge of, among other things, the decisions of the circuit, its pending cases, and the magnitude and nature of its future work load.

Id. at 627.

In the final analysis, the Court of Appeals properly exercised its power to grant a rehearing *en banc* in order to correct a manifest misinterpretation of Illinois law and to maintain the uniformity of its decisions with respect to Illinois product liability law. The *en banc* proceeding in this action provided substantial justice and a proper resolution of this matter. There is no error for this Court to correct.

CONCLUSION

Petitioner has failed to present specific and important reasons to invoke this Court's discretionary review of the Court of Appeals' decision. There is no federal question or constitutional question involved in this action. This petition merely focuses on the Court of Appeals' interpretation of Illinois substantive, product liability law. Given the thorough and extensive review of Illinois case law, the Court of Appeals correctly concluded the Petitioner's claims were not maintainable under Illinois law. The Illinois Supreme Court declined to address the substantive issues raised in this case, thus requiring the Court of Appeals to predict how the Illinois Supreme Court would resolve this matter. The Court of Appeals' determinations were reasonable and should not be disturbed.

For the foregoing reasons, Respondents respectfully request that this court deny the Petition for a Writ of Certiorari.

Dated: September 21, 1994

Respectfully submitted,

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